(1)

89-452

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ICG PETROLEUM, INC.
and FLYING J PETROLEUMS, INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JAMES D. WATKINS, SECRETARY OF ENERGY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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63 pp

QUESTION PRESENTED

Should a person be barred from judicial review of agency action by a newly enacted statute of limitations that was not properly codified and that was not otherwise discoverable through diligent legal research?

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Petitioners ICG Petroleum, Inc., formerly ICG Vista Petroleums, Inc. ("ICG"), and Flying J Petroleums, Inc. ("Flying J") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals entered in the proceeding on June 30, 1989 with final order denying petition for rehearing *en banc* entered on August 17, 1989.[1]

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[1] Pursuant to Supreme Court Rule 28.1, all parent companies, applicable subsidiaries and affiliates are set forth in the Appendix at 37a.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals, entered June 30, 1989, and its final order, entered August 17, 1989, are unreported and are reproduced in the Appendix at 2a and 1a, respectively. The Memorandum Opinion and Order of the United States District Court for the District of Columbia, entered on October 14, 1988, is unreported and is reproduced in the Appendix at 9a.

JURISDICTION

The final judgment of the Temporary Emergency Court of Appeals was entered on August 17, 1989, the petition for certiorari being filed within thirty days of that date. This Court's jurisdiction is invoked under § 211(G) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1982), as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (1982).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution is reproduced in the Appendix at 14a.

STATUTORY PROVISIONS INVOLVED

Section 205(c) of House Resolution No. 988, 93rd Congress, October 8, 1974, enacted into permanent law by Pub. L. 93-554, 2 U.S.C. § 285b (1982) is reproduced in the Appendix at 15a. Section 3005(e) of the Petroleum Overcharge Distribution and Restitution Act, 15 U.S.C. § 4504(e) (1982 & Supp. IV 1986), is reproduced in the Appendix at 26a. Section

504(b)(1) of the Department of Energy Organization Act, 42 U.S.C. § 7194(b)(1) (1982), is reproduced in the Appendix at 32a.

STATEMENT OF THE CASE

Petitioner petroleum refiners were denied judicial review of a Federal Energy Regulatory Commission ("FERC") decision based upon regulations promulgated under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 (1982) ("EPAA"). Petitioners' request for review was denied because of an inaccessible and undiscoverable new statute of limitations on judicial review actions which was enacted by Congress as part of the Petroleum Overcharge Distribution and Restitution Act, 15 U.S.C. § 4501 (1982 & Supp. IV 1986) ("PODRA").

By Memorandum and Order of October 14, 1988 (App. at 9a), the United States District Court for the District of Columbia granted the motion of respondents U.S. Department of Energy and Secretary of Energy Herrington (referred to collectively as "DOE") to dismiss petitioners' complaint seeking judicial review of FERC's decision on the ground that petitioners' suit was not filed within the time period prescribed in Subsection 3005(e) of PODRA, enacted October 21, 1986 as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986), and codified at 15 U.S.C. § 4504(e) (1982 & Supp. IV 1986).

ICG and Flying J appealed the district court's decision to the Temporary Emergency Court of Appeals ("TECA"), whose opinion issued June 30, 1989. TECA ruled that (a) the new statute of limitations applied to this case, (b) seventy-five days afforded a sufficient

time for procedural due process purposes for petitioners to find the statute, and (c) the district court did not abuse its discretion in refusing to suspend the application of the statute. ICG and Flying J requested a rehearing *en banc* which TECA denied August 17, 1989.

A. Statutory and Regulatory Background

In November 1973 Congress enacted EPAA, which mandated the creation of comprehensive allocation and pricing regulations for crude oil and petroleum products. In response, DOE established a multi-tiered system of crude oil price controls in which certain domestic crude oil was subject to "old" or "lower tier" ceiling prices while certain other domestic crude oil was subject to higher, but still controlled "new" or "upper tier" ceiling prices. *See generally* 10 C.F.R. Part 212, Subpart D (1989). To prevent refiners with a disproportionate supply of cheaper "old oil" from having a competitive advantage due to lower crude oil costs, in 1974 DOE issued its Entitlements Program regulations. 10 C.F.R. § 211.67; 39 Fed. Reg. 42,246 (Dec. 4, 1974).

ICG and Flying J were both small and independent refiners, a protected class of refiners under EPAA. *See* 15 U.S.C. § 753(b)(1)(D) (1982). To provide exception relief where DOE regulations jeopardized the competitive position of small and independent refiners, Congress required DOE to make "adjustments" to "any rule, regulation or order" issued under EPAA "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens. . . ." 42 U.S.C. § 7194(a) (1982).

B. ICG's Application to DOE for Exception Relief

In January of 1980, ICG applied for exception relief to DOE's Office of Hearings and Appeals ("OHA"). ICG sought relief because it was suffering far higher crude oil costs than its competitors as the direct result of several DOE regulatory programs. Specifically, ICG sought exception relief from the Entitlements Program, 10 C.F.R. § 211.63 (1980), and the Emergency Buy/Sell Program, 10 C.F.R. § 211.65(c)(2) (1980).

On April 1, 1980, Flying J acquired ICG's domestic refining operations and operated them under the name Thunderbird Resources, Inc. ("Thunderbird"). Following the acquisition, ICG and Thunderbird jointly pursued the application for relief. On March 30, 1982, OHA issued its final decision and order denying relief, citing the relatively large proportion of less valuable refined products in ICG's product slate as the reason for ICG's lack of profitability and Flying J's discretionary business decision to acquire the ICG operations as the cause of Thunderbird's losses. *ICG Vista Petroleums, Inc.* [1981-1982 Transfer Binder DOE 9] Energy Mgmt. (CCH) ¶ 81,026, 82,680-81.

C. Review by FERC of OHA's Denial of Relief

In April of 1982, petitioners filed a timely petition with FERC for review of the OHA Decision and Order. *See* 42 U.S.C. § 7194(b) (1982). On November 10, 1986, FERC affirmed the OHA Decision and Order on a legal theory directly at odds with its prior decisions on exception relief. *Compare ICG Vista Petroleums, Inc.* [1986 Transfer Binder 37 FERC] Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,122 *with New Jersey Highway Authority* [1978-1981 FERC Appeals Decisions] Fed. Energy Reg. Comm'n Rep. (CCH)

¶ 46,116 (1980), *aff'd*, [1978-1981 FERC Appeals Decisions] Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 46,140 (1980).

D. The 1987 Suit for Judicial Review

On November 6, 1987, ICG and Flying J brought this action in the U.S. District Court for the District of Columbia under Section 504(b)(1) of the DOE Organization Act, 42 U.S.C. § 7194(b)(1), which guarantees the right of judicial review of FERC denials of requests for exception relief. That statute, however, does not include a limitations period for the filing of such suits. In the absence of a statutory limitations period prescribed by Congress, a federal court generally applies the most analogous statute of limitations period of the state in which the court sits. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). Since the District of Columbia Code contains no directly analogous statute of limitations period, proper analysis required application of the three-year statute governing actions "for which a limitation is not otherwise specifically prescribed." D.C. Code Ann. § 12-301(8) (1981). As a precautionary measure, ICG and Flying J filed this suit on November 6, 1987, within one year of the November 10, 1986 FERC decision, in order to comply with the shortest limitations period in the D.C. Code. D.C. Code Ann. § 12-301(4), (5) (1981).

On October 21, 1986, shortly before the FERC decision denying ICG relief, Congress enacted PODRA, which contained the following language in Subsection 3005(e):

> Any review of a final agency action determined under section 503 or 504 of the

> Department of Energy Organization Act may not be initiated in any court by any person subject to such action after—
>
> (1) 60 days after the effective date of that action; or
>
> (2) 90 days after the date of the enactment of this Act, whichever occurs later.

15 U.S.C. § 4504(e) (1982 & Supp. IV 1986). Subsection 3005(e) would have required petitioners to file suit by January 19, 1987, ninety days after enactment and seventy days after the FERC decision.

Petitioners and their counsel commenced this action for judicial review unaware of the new limitation period for judicial review, as diligent legal research at the time of the FERC decision did not, and could not, reveal the new limitation provision's existence. Subsection 3005(e) did not amend Section 504 of the DOE Organization Act, the statute that created the right of judicial review of administrative denials of exception relief upon which counsel relied. 42 U.S.C. § 7194 (1982). PODRA amended no other part of the DOE Organization Act, or the EPAA, or the related Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1982). Instead, PODRA was codified in obscurity, as Chapter 71 of Title 15 of the United States Code, and inserted after a chapter on "Comprehensive Smokeless Tobacco Health Education." 15 U.S.C. § 4501 (1982 & Supp. IV 1986). Because PODRA's limitation provision for judicial review was not cross-indexed or cross-referenced by the annotated versions of any of the affected statutes concerned with energy price and allocation controls, research into those statutes did not reveal the limitation. *See* 42 U.S.C.A.

§ 7101 (1983) (DOE Organization Act); 15 U.S.C.A. § 751 (1976) (EPAA); 12 U.S.C.A. § 1904 note (1980) (Economic Stabilization Act). Petitioners' attorneys did not receive the "pocket part" of the U.S. Code Annotated containing the statute until April 14, 1987, at which time the limitation period in Subsection 3005(e) had already expired. Receipt of the "pocket part" did not aid discovery since the United States Code Annotated contained no cross-reference to the relevant statutes and the statute of limitations did not appear in the index under judicial review for exception relief. Similarly, the 1986 supplement to the United States Code was not made available for public distribution until late in 1987; and it contained no reference to Section 504 of the DOE Organization Act. *See* Appendix at 26a.

The "advance sheet" periodicals on which attorneys normally rely for information on recent developments in the energy field did not refer to the limitation period in Subsection 3005(e), confirming its inaccessability even to those monitoring energy legislative developments. For example, although the October 29, 1986 issue of *Energy Management*, a Commerce Clearing House, Inc. publication, described PODRA generally, no mention was made of the limitation period in Section 3005(e), nor was that provision mentioned in any other issue of that publication. The same was true for *FERC Reporter*, published by Commerce Clearing House, Inc. The "Statutes and Regulations" index of that reporter was amended on October 28, 1986 to reflect the titles of the Omnibus Budget Reconciliation Act of 1986 (¶ 6251) and PODRA (¶ 6252), but the text of the energy-related provisions was not reproduced. The *FERC Reporter* "Last Report Let-

ter" likewise made no reference to the limitation period in Section 3005(e). The weekly report *Inside F.E.R.C.*, published by McGraw-Hill, Inc., was equally silent.

Even though the FERC decision in *ICG Vista Petroleum, Inc.* was rendered soon after the enactment of PODRA and despite DOE's contention before both the district court and TECA that Subsection 3005(e) applies to all exception cases, nothing in FERC's decision alerted the litigants to the new limitation period. At no time did DOE or FERC notify ICG or Flying J of the new statute.

Thus, due to incorrect codification, PODRA's new judicial review limitation was not at all discoverable through diligent legal research in all pertinent legal publications, references and advance sheets. The statute of limitations simply was not made known to the public through any conventional legal research sources. Indeed, even today the statute remains mysteriously hidden from legal research in an unlikely corner of the official U.S. Code.

REASONS FOR GRANTING THE WRIT

I. THE CASE RAISES AN IMPORTANT CONSTITUTIONAL ISSUE UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION

This case raises an important constitutional question involving the government's ministerial duties to make the statutory laws of the United States reasonably accessible to the persons whose rights and obligations the statutes affect. Basic to our system of jurisprudence is the principle that procedural due process requires that persons affected by government action be accorded adequate notice. *Mullane v. Cen-*

tral Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Consequently, persons whose rights are affected by legislation must be provided reasonable access to that legislation. *See Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). Where statutes that state and federal legislatures enact cannot be discovered through diligent research, the persons whose rights are affected by those hidden and secret laws, are denied a most fundamental and basic constitutional right, the right to due process.

A. Congress Has Mandated Public Access To The Laws

Congress has clearly recognized the vital importance of public access to the statutory laws of the United States by providing explicitly for the supplementation and periodic republication of the United States Code under the supervision of the Committee on the Judiciary of the House of Representatives. *See* 1 U.S.C. § 202 (1982). To meet the formidable task of regularly publishing the Code, as well as timely slip editions of enactments and the Statutes at Large, the Congress has created both the Office of the Law Revision Counsel in the House of Representatives and the Office of the Federal Register under the National Archives and Records Administration. *See* 2 U.S.C. § 285 (1982); 44 U.S.C. § 2102 (1982 & Supp. V 1987). The Office of the Law Revision Counsel is charged with the express duty "[t]o classify newly enacted provisions of law to their *proper* positions in the code." 2 U.S.C. § 285b(4) (1982) (emphasis added). The Office of the Federal Register is required to publish all statutes in slip or pamphlet form and ultimately to accumulate the slip laws into bound volumes of the Statutes at Large. *See* 44 U.S.C. §§ 711, 728 (1982 & Supp. V 1987).

Clearly aware of difficulty in legal research resulting from the vast number and wide variety of legislative enactments, Congress has attempted to avoid miscodification such as the PODRA statute of limitations by statutorily mandating the inclusion of bill or joint resolution numbers in the margins of the United States Statutes at Large. *See* 44 U.S.C. § 729 (1982 & Supp. V 1987). While this requirement is of perhaps only minimal assistance, the requirement nevertheless demonstrates Congress' concern for the accessibility of the law.

Expressing further the fundamental policy that laws must be accessible to allow persons to regulate their behavior accordingly, Congress has provided for extremely broad public access to federal administrative law through the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552(1)(a)(1982). Indeed, this Court has firmly endorsed FOIA's basic policy of public access to administrative law and decision making. In *Morton v. Ruiz*, the Court struck down provisions in the Bureau of Indian Affairs Manual regarding eligibility of Indians for general assistance programs because the provisions were not published in the Federal Register. 415 U.S. 199, 232-35 (1974); *see also Historic Green Springs, Inc. v. Bergland*, 497 F.Supp. 839, 855-57 (E.D.Va. 1980) (holding that agency designation of certain land as a historic landmark without required publication violated due process).

B. The Government Failed In Its Ministerial Duty To Classify Newly Enacted Statutes Properly

Neither ICG and Flying J, their legal counsel, nor probably this Court would dispute the magnitude of the administrative task confronting the Office of the Law Revision Counsel and the Office of the Federal

Register in classifying and publishing the voluminous legislation enacted by Congress each year. However, despite the enormous volume of statutory law flowing from the legislative branch, the functions of these two offices appear to be performed almost entirely without the benefit of written procedures. *See* Zinn, *Revision of the U.S. Code*, 51 Law Libr. J. 388, 394 (1958).

This lack of established procedures for fulfilling the government's ministerial duty to make the statutory laws reasonably accessible virtually invited the error that resulted in the improper classification and codification of the statute of limitation at issue in this case. Enacted as part of PODRA's general statute of limitations on civil enforcement reimbursement and distribution actions, the limitation on judicial review of EPAA actions was placed in Title 15 of the United States Code as a part of Chapter 71 following a chapter on "Comprehensive Smokeless Tobacco Health Education." Even the most careful review of Title 15's chapter headings reveals to the legal researcher a lack of methodology in chapter placement in the title. Therefore, a researcher necessarily must rely on the Code's index and cross-references in order to conduct an efficient and logical legal search.

Prior to publication of supplements of the United States Code or United States Code Annotated, the public and legal practitioners may acquaint themselves with statutory developments only through slip or pamphlet publications of recently enacted laws. However, these publications may not always contain cross-referencing to existing statutes that new legislation affects or constructively amends. To expect one to

discover a new statute without such basic finding aids is both unreasonable and illogical.

In this case, the provision imposing a limitation period on judicial review of actions for exception relief under EPAA was "imbedded," as TECA aptly observed, in a code provision otherwise dealing primarily with procedures for disbursing DOE and court-escrowed funds recovered from overcharge violations of the petroleum price and allocation controls. *See generally* 1986 U.S. Code Cong. and Admin. News 3607, 3652-55. In fact, currently, this limitation on judicial review of exception relief under EPAA remains hidden in Chapter 71 of Title 15, referenced only by a footnote cross-citation to EPAA in the United States Code supplement distributed first in November, 1987. No cross-reference appears in the United States Code Annotated. The index of the United States Code Annotated refers the legal researcher to the general limitation provision only in the context of its applicability to PODRA, but not to its applicability to judicial review under Section 504 of the DOE Organization Act. Fundamental fairness demands that litigants be given better access to a new law than was afforded in this case.

C. Judicial Intervention Is Necessary To Avoid Further Impairment Of Due Process Rights In The Management of Information Access

Viewed in light of the burgeoning number of legislative enactments, this case demonstrates the compelling need to protect procedural due process by ensuring that statutory enactments, particularly when they amend or affect existing laws, are reasonably discoverable through diligent research.

This court has long recognized the significant effect of statutes of limitation upon due process rights:

> [A]ll statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Wilson v. Iseminger, 185 U.S. 55, 62 (1902). Implicit in the right to be heard is the principle recited in *Mullane* that the fundamental right of procedural due process hinges on having notice of a statute of limitations.

More recently, one federal court directly examined the potential for injury to due process rights resulting from the government's failure to codify legislation. In *Armstrong v. Maple Leaf Apartments, Inc.*, 436 F.Supp. 1125, 1146 (N.D. Okla. 1977), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1979), *cert. denied*, 449 U.S. 901 (1980), the district court held that the government's failure to publish specially enacted legislation that affected Indian land transactions some 20 years later failed to provide adequate notice to the public and violated the party's due process rights. Only a footnote appeared in the United States Code referencing the enactment, and no references to the law appeared in the United States Code Annotated. 436 F. Supp. at 1145. The evidence showed that persons who obtained knowledge of the law had learned

of it from the Solicitor's Office of the Interior Department, the Code reference, or a limited circulation treatise of Indian laws. 436 F. Supp. at 1146.

The potential impairment of due process rights resulting from legislative cataloging also has been acknowledged by federal courts reviewing state constitutional provisions that require acts or resolutions to relate only to one subject that is clearly stated in the title of the section. For example, in *McGee v. Holan Div. of Ohio Brass Co.*, 337 F. Supp. 72, 75 (D.S.C. 1972), the district court held that an enlarged version of the Uniform Commercial Code containing provisions for jurisdiction and service of process in personal injury cases violated a state constitutional requirement that legislative acts relate only to one subject where the title for the act contained no "warning" of the jurisdictional and service of process provisions. Noting that in a large act the title cannot reference every provision, the court found that the Act's jurisdiction and service of process provisions were so unrelated and foreign to its other provisions and its purpose that the title should have given notice. *Id.* at 76. "The purpose of this Constitutional provision is to prevent the General Assembly from being misled and to apprise the people of the subject of the proposed legislation." *Id.*

The incorrect codification of the statute of limitations applicable to an action under EPAA in the Code provision applicable to civil enforcement actions under PODRA without notice is analogous to these cases and violated the government's statutory duty under 2 U.S.C. § 285b(4) (1982) to classify legislative enactments properly.

II. THE DECISION BELOW UNJUSTLY DENIED PETITIONERS THEIR FUNDAMENTAL CONSTITUTIONAL RIGHT TO DUE PROCESS

In the proceedings below, DOE consistently avoided the issue of whether the statute of limitation's placement, either in the Code or in PODRA in its slip form, was reasonably discoverable. Rather, DOE focused its arguments on the reasonableness of the *time* to discover the new law. Indeed, DOE never challenged petitioners' contention that the statute was not reasonably discoverable. ICG and Flying J do not dispute that a sixty to ninety day "grace period" affords persons a reasonable time to become acquainted with *discoverable* law, but the reasonableness of the "grace period" in this case is not now and never has been the issue.

Following upon DOE's misplaced argument, however, TECA held flatly that the "grace period" provided by PODRA was "reasonable" and completely avoided the relevant due process issue of the judicial review limitation provision's improper codification and non-discoverability. DOE's misconstruction of the due process issue distorted judicial decision making, not only before TECA, but before the district court, as well. Incorrectly perceiving the case as one involving the constitutional sufficiency of PODRA's "grace period," the district court tersely described petitioners' constitutional challenge as "frivolous." ICG and Flying J readily agree that a due process challenge based upon the sufficiency of PODRA's "grace period" probably would be "frivolous" in light of this Court's holding in *Texaco, Inc.* However, the precise issue raised by petitioners that both courts below failed to examine is whether petitioners' procedural

due process rights were violated by application of the newly enacted limitation on judicial review that was improperly codified under PODRA's general statute of limitations on civil enforcement reimbursement and distribution actions and that was not otherwise discoverable through diligent legal research.

While ignorance of the law is no excuse, principles of notice and fairness demand that such a generalization must not be applied blindly. Under our judicial system, ignorance of the law should be excused when persons are not afforded reasonable access to the law. One cannot reasonably be expected to be knowledgeable of laws that cannot be found.

This Court has not addressed the important due process issue raised by petitioners as to the improper codification of the statutory laws. The Court should do so in this case not only to rectify the injustice suffered by petitioners but, more importantly, to stimulate correction of these ministerial deficiencies. Failure to confront the issue of hidden and secret laws will perpetuate the impairment of a most fundamental and basic constitutional right, the right to procedural due process.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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September 15, 1989

APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-109

ICG PETROLEUM, INC. and
FLYING J PETROLEUMS, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY.

Before: METZNER, PECK and THORNBERRY, Judges.

ORDER

Upon consideration of Appellants' petition for rehearing *en banc*, it is

ORDERED that said petition for rehearing *en banc* is DENIED. The Court's mandate shall issue seven days from the date of this order—Thursday, August 24, 1989.

FOR THE COURT:
/s/ Cynthia A. Dykes
Cynthia A. Dykes
Clerk

August 17, 1989

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA No. D.C. 109

ICG PETROLEUM, INC. and
FLYING J PETROLEUMS, INC.,
Plaintiffs-Appellants,

-against-

UNITED STATES DEPARTMENT OF ENERGY and JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Defendants-Appellees.

FILED
TEMPORARY EMERGENCY COURT
OF APPEALS OF THE UNITED STATES

JUN 30 1989

CYNTHIA A. DYKES
CLERK

Appeal from an Order of the District Court for the District of Columbia (Civil Action No. 87-3033)

(Submitted on the Briefs Decided: June 30, 1989)

Edwin Jason Dryer and Dennis A. Henigan, Foley & Lardner, Washington, D.C. were on the brief for Plaintiffs-Appellants.

Thomas H. Kemp and Stephen C. Skubel, United States Department of Energy, Office of the General Counsel, Washington, D.C., were on the brief for Defendants.

Before METZNER, PECK and THORNBERRY, Judges.

METZNER, Judge.

Appellants ICG Petroleum, Inc. and Flying J. Petroleums, Inc. ("ICG" and "Flying J") appeal from an order of the District Court for the District of Columbia granting appellee Department of Energy's ("DOE") motion to dismiss appellants' petition for review of the denial of an application for exceptions relief under section 504(a) of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. § 7194 (1983). The dismissal was granted on the ground that the time period for review of such actions had elapsed. Section 3005(e) of the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. § 4504(e) (West Supp. 1988). We affirm the district court's decision.

ICG and Flying J are small independent refiners of petroleum products. In January 1980, ICG applied to the Department of Energy's Office of Hearings and Appeals ("OHA") for "exceptions" relief from the impact of transfer payments and other regulations established under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. *See* 10 C.F.R. § 211.66-69. In April, 1980, ICG's domestic refining operations were acquired by Flying J. Following the acquisition, ICG and Flying J jointly pursued the application for exceptions relief.

On March 30, 1982, OHA issued a final decision and order denying both ICG and Flying J exceptions relief. *ICG Vista Petroleums, Inc.*, 9 DOE ¶ 81,026 (1982). On April 29, 1982, appellants filed a petition with the Federal Energy Regulatory Commission ("FERC") to review the OHA decision and order. Four and a half years later,

FERC affirmed the OHA decision and order on November 10, 1986.

On October 21, 1986, less than three weeks prior to the FERC decision affirming the denial of exceptions relief to plaintiffs, Congress enacted PODRA. 15 U.S.C. § 4501-07. Subsection 3005(e) states as follows:

> "Any review of a final agency action determined under section 503 or 504 of the Department of Energy Organization Act may not be initiated in any court by any person subject to such action after—
>
> (1) 60 days after the effective date of that action; or
>
> (2) 90 days after the date of the enactment of this Act, whichever occurs later."

15 U.S.C. § 4505(e). Under subdivision (2), plaintiffs were required to file suit for review of their section 504 request for exceptions relief by January 19, 1987.

On November 6, 1987, approximately ten months after the running of the PODRA time limit for review of section 504 final actions, and about one year after entry of the order sought to be reviewed, plaintiffs instituted this action in the United Stated District Court for the District of Columbia. On October 19, 1988, District Judge Harold Greene dismissed the complaint for failure to comply with the PODRA limitations period. This appeal followed.

Appellants offer three arguments in support of their contention that the district court erred in dismissing their complaint.

First, they argue that the time period provided in section 3005(e) is inapplicable to their appeal because it was not intended to apply to all cases seeking judicial review of denials of exceptions relief. Appellants urge that the time period was intended to apply only to a narrow class

of cases in which the applicant for exceptions relief is also the target of a government enforcement action, and is seeking relief from the regulations alleged to have been violated.

In support of their argument, they point to the language and emphasis of PODRA as a whole, which is primarily concerned with creating mechanisms for the speedy resolution of government civil enforcement actions. *See* 15 U.S.C. §§ 4505(a)-(d).

However, the express language of section 3005(e) states that it applies to "*Any* review of a final agency action determined under section 503 or 504 of the Department of Energy Organization Act . . . ." There is nothing in the legislative history of PODRA which supports appellant's narrow reading of the time period, apart from the fact that it is imbedded in a statute which is primarily concerned with the expeditious resolution of civil enforcement actions brought by the government.

The Supreme Court has consistently held that the ordinary meaning of a statute's language must be regarded as conclusive unless there is a clearly expressed legislative intention to the contrary. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). In addition, the Supreme Court has also held that any limitations provisions in a statute must be strictly construed. *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Soriano v. United States*, 352 U.S. 270, 276 (1957).

We agree with the district court's conclusion that there is no reason to go beyond the plain meaning of the language contained in section 3005(e) by narrowing the application of the time period to a limited class of section 504 cases.

Second, appellants argue that the application of this time period to them is an unconstitutional denial of due process because they "were given no notice of the new time limit and had no reasonable opportunity to learn of it because it could not be discovered through exhaustive legal research."

All persons are presumptively charged with knowledge of the law. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). However, the Supreme Court recognizes that this presumption "may be overcome in cases in which the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it." *Atkins, Comm'r. of the Massachusetts Dept. of Public Welfare v. Parker*, 472 U.S. 115, 130 (1985) (citing *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)). The issue is whether the ninety-day grace period provided by PODRA section 3005(e) (2), 15 U.S.C. § 4504(e) (2), provides the energy companies affected by its new limitations period an adequate opportunity to learn of the existence of the statute and to become become [sic] familiar with its terms. In *Atkins* the Supreme Court held that a ninety-day grace period prior to a change in a household's food-stamp allotment provided constitutionally sufficient notice. *Atkins*, *supra* at 131.

When enacting legislation which affects substantial rights, "[g]enerally, a legislature need to nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco*, *supra* at 532. The Court emphasized that it is reasonable to expect that property owners be charged with the duty of monitoring statutes that may affect their interests. *Id.* In a dissenting opinion Justice Brennan commented that the Court treated "property owners as businessmen, of whom we do indeed expect the greatest attentiveness to regulatory obligations in the conduct of their business affairs." *Id.* at 547.

Independent oil refiners, such as the appellants in this case, may also reasonably be expected to be extra attentive to their regulatory obligations in an industry that is as heavily regulated as the oil industry. This is especially true as to the regulations regarding price and allocation controls to which the industry has been subjected for such a long period of time. PODRA's ninety-day grace period in section 3005(e) (2) provides the energy companies who are affected by its provisions with more than an adequate opportunity to learn of the existence of the statute and become familiar with their new obligations.

In addition, appellants' own submissions reveal that they had actual notice of the passage of PODRA on November 5, 1986, which is 75 days prior to the running of the time period, when they received a copy of the October 29, 1986, issue of "Energy Management," a trade publication. Seventy-five days is sufficient time in which to ascertain the provisions of a statute which apparently affects a party's interests. The appellants were not denied their constitutional right to fair notice.

It has been urged that the applicability of the limitation periods violates due process because notice of the enactment of those periods, other than entry in the daily Congressional Record, did not appear until April 1987 with the issuance of the supplement to the United States Code. Therefore, the limitation period should be measured from that date. We need not address this due process argument, since this suit was not filed until November 6, 1987, well after 60 days from the issuance of the supplement.

Finally, appellants argue that the district court abused its discretion in failing to exercise its equitable power by tolling the running of the limitations period. A district court may toll a limitations provision in a statute when "tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 558 (1974). The legislative history

of PODRA is inconclusive on this issue. In addition, the Supreme Court has held that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276 (1957).

We agree with the district court that there are no mitigating circumstances that would support the exercise of such an equitable power, assuming that such power exists under PODRA. Appellants were expected to be attentive to their regulatory obligations, they had actual notice of the enactment of PODRA and adequate opportunity to learn of the new limitations period.

The order of the district court is affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 87-3033

ICG VISTA PETROLEUMS, INC., *et al.*,
Plaintiffs,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants.

FILED

OCT 14 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM AND ORDER

Plaintiffs in this action seek review of a final agency order issued pursuant to Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194, which held that plaintiffs did not qualify for exception relief from a portion of the Department of Energy's (DOE) crude oil price and allocation regulations. Defendants have moved to dismiss the complaint for failure to comply with the applicable statute of limitations.

Final agency action as to plaintiffs' complaint occurred on November 10, 1986, when the Federal Energy Regulatory Commission issued its order affirming the denial of exception relief by the DOE's Office of Hearings and Appeals. *See ICG Vista Petroleums, Inc.*, 37 FERC ¶ 61,122 (1986). Upon the entry of final agency action, judicial re-

view became available in district court, *see* 42 U.S.C. § 7194(b), and this complaint subsequently was filed on November 6, 1987.

Defendants challenge the vitality of the complaint, noting its noncompliance with the time limitation provision of the Petroleum Overcharge Distribution and Restitution Act (PODRA), Pub. L. 99-509, 100 Stat. 1884 (October 21, 1986), *codified*, 15 U.S.C. § 4504(e), which reads as follows:

> Any review of a final agency action determined under section 503 or 504 of the Department of Energy Organization Act may not be initiated in any court by any person subject to such action after—
>
> (1) 60 days after the effective date of that action; or
>
> (2) 90 days after the date of the enactment of this Act, whichever occurs later.

Under the longer of the calculation methods set forth in the above-quoted section of the PODRA, plaintiffs' complaint was required to be filed no later than January 19, 1987, more than ten months prior to the eventual filing date. Therefore, argue defendants, the complaint must be dismissed as untimely.

Although plaintiffs acknowledge that they failed to file their action within the time limitation set forth in PODRA, they seek to excuse their failure on three grounds: (1) that 15 U.S.C. § 4504(e) is inapplicable to this action; (2) that even if 15 U.S.C. § 4504(e) were applicable here, the Court should exercise its equitable power to relieve plaintiffs of the running of the limitations period; and (3) that the application of 15 U.S.C. § 4504(e) to plaintiffs would violate the Due Process Clause of the United States Constitution. Each of these arguments will be considered in turn.

Plaintiffs first argue that the limitations period set forth in 15 U.S.C. § 4504(e) does not apply to all cases seeking judicial review of denials of exception relief. Rather, plaintiffs contend that it applies only to those cases in which the party seeking judicial review is also the target of a government enforcement action alleging violation of the petroleum price and allocation controls. This interpretation of the statute is mandated, they posit, by the PODRA as a whole and its legislative history.

However, going behind the plain language of a statute in search of a possibly contrary Congressional intent is a "step to be taken cautiously" even under the best of circumstances. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). That language must be given conclusive weight unless the legislature expresses an intent to the contrary. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). There is no indication in the legislative history that Congress intended other that what it said as to the scope of coverage of the limitations provision, and the plain language of the statute indicates that the statute of limitations set out therein was to cover more than just civil enforcement appeals. The Court will not travel down the tortured path that plaintiffs suggest in order to arrive at a reading of the statute which holds otherwise.

Therefore, because this action seeks to challenge an agency order issued pursuant to section 504, it is subject to the limitations provisions of the PODRA. The statute of limitations is an integral part of the government's consent to be sued and, therefore, must be strictly construed. *See Soriano v. United States*, 352 U.S. 270, 276 (1957). As the Court of Appeals of this Circuit has repeatedly held, strict compliance with the limitations period is a jurisdictional prerequisite to bringing suit which the Court cannot extend. *See, e.g., Walters v. Secretary of Defense*, 725 F.2d 107, 112, n.12 (D.C. Cir. 1983). Plaintiffs' failure to institute this action within the time frame required by

statute relieves this Court of jurisdiction to entertain the appeal, and the complaint accordingly must be dismissed.

Plaintiffs argue that, even if this action falls within the PODRA limitations provision, the Court should exercise its equitable power and relieve it of the running of the statutory period. On the whole, plaintiffs' reasoning is unconvincing. First, there is a question as to whether a Court has the authority to extend a statutorily imposed limitations period. *Compare Soriano v. United States*, 352 U.S. at 276 *with American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 558 (1974). Without reaching that question, however, the Court finds that plaintiffs have shown no extraordinary circumstance to support the exercise of that equitable power, should it exist.

Plaintiffs contend that their failure to file suit within the appropriate time was due largely to counsel's ignorance of the amended statute and its provisions. This Court does not consider counsel's failure to discover an applicable legal provisions [sic] a sufficient basis for waiver of that legal provision. Although the factual situation presented in this matter is somewhat unusual, the Court remains unpersuaded that it sets forth good cause for equitable tolling of the statute.

The Court is likewise unimpressed with plaintiffs' suggestion that application of 15 U.S.C. § 4504(e) to them would be in contravention of the Due Process Clause of the United States Constitution. A limitations period passes constitutional muster if it provides a reasonable time for commencement of the action before the bar takes place. *See, e.g., Terry V. Anderson*, 95 U.S. 628, 632-33 (1877). A sixty day limitations period is a reasonable time period; the Court finds the constitutional challenge posed here to be frivolous.

This appeal of an agency decision issued pursuant to section 504 of the Department of Energy Organization Act is subject to the limitations period established by 15 U.S.C.

§ 4504(e). There exists neither a constitutional ban to its running as to plaintiff, nor good cause for equitable tolling of its effect which would relieve plaintiffs of their failure to comply with its provisions. Accordingly, it is this 14th day of October 1988

ORDERED that defendant's motion to dismiss be and it is hereby granted.

/s/ Harold H. Greene
HAROLD H. GREENE
DISTRICT COURT JUDGE

UNITED STATES CONSTITUTION
AMENDMENT V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1 U.S.C. §202 (1982)

§ 202. Preparation and publication of Codes and Supplements

There shall be prepared and published under the supervision of the Committee on the Judiciary of the House of Representatives—

a) Cumulative Supplements to Code of Laws of United States for each session of Congress

A supplement for each session of the Congress to the then current edition of the Code of Laws of the United States, cumulatively embracing the legislation of the then current supplement, and correcting errors in such edition and supplement;

(b) Cumulative Supplement to District of Columbia Code for each session of Congress

A supplement for each session of the Congress to the then current edition of the Code of the District of Columbia, cumulatively embracing the legislation of the then current supplement, and correcting errors in such edition and supplement;

(c) New editions of Codes and Supplements

New editions of the Code of Laws of the United States and of the Code of the District of Columbia, correcting errors and incorporating the then current supplement. In the case of each code new editions shall not be published oftener than once in each five years. Copies of each such edition shall be distributed in the same manner as provided in the case of supplements to the code of which it is a new edition. Supplements published after any new edition shall not contain the legislation of supplements published before such new edition.

(July 30, 1947, ch. 388, 61 Stat. 637.)

2 U.S.C. §285 (1982)

§ 285. Establishment of Office

There is established in the House of Representatives an office to be known as the Office of the Law Revision Counsel, referred to hereinafter in this chapter as the "Office".

(Pub. L. 93-554, title I, ch. III, §101, Dec. 27, 1974, 88 Stat. 1777.)

2 U.S.C. §285b (1982)

§ 285b. Functions of Office

The functions of the Office shall be as follows:

(1) To prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of

substance and of form, separately stated, with a view to the enactment of each title as positive law.

(2) To examine periodically all of the public laws enacted by the Congress and submit to the Committee on the Judiciary recommendations for the repeal of obsolete, superfluous, and superseded provisions contained therein.

(3) To prepare and publish periodically a new edition of the United States Code (including those titles which are not yet enacted into positive law as well as those titles which have been so enacted), with annual cumulative supplements reflecting newly enacted laws.

(4) To classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law.

(5) To prepare and submit periodically such revisions in the titles of the Code which have been enacted into positive law as may be necessary to keep such titles current.

(6) To prepare and publish periodically new editions of the District of Columbia Code, with annual cumulative supplements reflecting newly enacted laws, through publication of the fifth annual cumulative supplement to the 1973 edition of such Code.

(7) To provide the Committee on the Judiciary with such advice and assistance as the committee may request in carrying out its functions with respect to the revision and codification of the Federal statutes.

(Pub. L. 93-554, title I, ch. III, § 101, Dec. 27, 1974, 88 Stat. 1777; Pub. L. 94-386, § 1, Aug. 14, 1976, 90 Stat. 1170.)

Section 2 of the Freedom of Information Act, 5 U.S.C. §552 (1982)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Reg-

ister and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) Those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of each index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of

policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld form the complainant. In such a case the court shall determine the matter de novo, and may examine the

contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to

the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such

notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (a) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confiden-

tial information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of the cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225.)

Section 4 of the Petroleum Overcharge and Distribution Act of 1986, 15 U.S.C. §4504 (Supp. IV 1986)

§ 4504. Statute of limitation

(a) In general

(1) Except as provided in subsection (b) of this section, the commencement of a civil enforcement action shall be barred unless such action is commenced before the later of—

(A) September 30, 1988; or

(B) six years after the date of the violation upon which the action is based.

(2) For purposes of paragraph (1), the term "commencement of a civil enforcement action" means—

(A) the signing and issuance of a proposed remedial order against any person for filing with the Office of Hearings and Appeals of the Department of Energy; or

(B) the filing of a complaint with the appropriate district court of the United States.

(3) For purposes of this section, the term "civil enforcement action" means an administrative or judicial civil action by the Secretary under the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et. seq.] or the Economic Stabilization Act of 1970 [12 U.S.C. 1904 note] (or the regulations issued thereunder) for the enforcement of any violation of such Acts or regulations.

(b) Exceptions

(1) In computing the periods established in subparagraphs (a) and (b) of subsection (a)(1) of this section, there shall be excluded any period—

(A) during which any person who is or may become the subject of a civil enforcement action is outside the United States, has absconded or concealed himself, or is not subject to legal process;

(B) during which facts material to the establishment and maintenance of a civil enforcement action could not be known;

(C) occurring before full compliance with any subpoena or special report order issued to any person under section 772 of this title, and such additional period (not to exceed 12 calendar months) after such compliance for the Secretary to consider the results thereof and commence a civil enforcement action;

(D) during the pendency of any relevant criminal action under the Acts or regulations described in subsection (a)(1) of this section during which a civil enforcement action is held in abeyance as a result of prosecutorial discretion and with or without a stay, and such additional period (not to exceed 12 calendar months) after a final judicial order or dismissal of such criminal action to commence a civil enforcement action;

(E) before the issuance of an order that constitutes final agency action on a request for adjustment from any rule, regulation, or order under section 7194 of title 42, and such additional period (not to exceed 12 calendar months) to commence a civil enforcement action; or

(F) of extension, to which the Secretary and the defendant have consented in writing, before the expiration of the time periods prescribed in subsection (a)(1) of this section.

(2) The provisions of subsection (a) of this section shall not affect or apply to any civil enforcement action commenced before, on, or after October 21, 1986, and re-

manded by the Office of Hearings and Appeals, the Federal Energy Regulatory Commission, or the court for further action of any kind.

(3) The provisions of subsection (a) of this section shall not apply to any agency orders issued under the Acts or regulations described in subsection (a)(1) of this section or to regulations issued under this chapter, other than a proposed remedial order subject to this section.

(c) Expression of intent

(1) It is the intent of the Congress that—

(A) the Secretary and the Administrator of the Economic Regulatory Administration shall, to the greatest extent possible and within the time frames specified on September 12, 1986, by such Administrator to the Committee on Energy and Commerce of the House of Representatives, commence civil enforcement actions with respect to all cases known by such Administrator as of October 21, 1986, and designated by such Administrator as "prelitigation cases", unless such an action is found not to be warranted;

(B) the Secretary and such Administrator not delay civil enforcement actions so as to cause the limitation in subsection (a)(1) of this section to apply to any such case;

(C) any negotiations for the purpose of settlement of alleged violations not delay the commencement of a civil enforcement action; and

(D) the Department of Justice cooperate in ensuring that activities necessary, including the enforcement of subpoenas, to commence civil enforcement actions are carried out in a timely manner.

(2) Any failure to comply with the time frames described in paragraph (1)(A) shall not be considered for any purpose

in any administrative or judicial proceeding subsequently commenced.

(d) End of investigations and audits

Notwithstanding any other provision of law, the Secretary shall not initiate, after January 1, 1987, any audit or investigation of alleged civil violations of the Acts or regulations described in subsection (a)(1) of this section for the purpose of commencement of any civil enforcement action. Nothing in this subsection shall affect or apply to any audit or investigation conducted with respect to any civil enforcement action commenced (within the limitation established by subsection (a)(1) of this section) before, on, or after October 21, 1986. Nothing in this subsection shall limit the authority of the Secretary to continue any audit or investigation initiated before January 1, 1987.

(e) Limitation on review

Any review of a final agency action determined under section 7193 or 7194 of title 42 may not be initiated in any court by any person subject to such action after—

(1) 60 days after the effective date of that action; or

(2) 90 days after October 21, 1986,

whichever occurs later.

(f) Oversight

(1) In order to ensure the expeditious, effective, and efficient resolution of all civil enforcement actions (whether or not in administrative or judicial litigation) and all cases pending at the Office of Hearings and Appeals under subpart V regulations, the Secretary shall—

(A) maintain a personnel level for the compliance program of the Economic Regulatory Administration of 170 full-time equivalents for fiscal year 1987, sub-

ject to normal attrition and subject to the provisions of any appropriation Act enacted for such fiscal year concerning such program; and

(B) maintain for the remainder of the program an adequate mix of lawyers, auditors, technical, clerical, and administrative personnel.

(2) By July 1, 1987, and by July 1 of each year thereafter, the Administrator of the Economic Regulatory Administration shall provide to the Committee on Energy and Commerce of the House of Representatives and to the Committee on Energy and Natural Resources of the Senate the full-time equivalent level necessary for such compliance program for the next fiscal year and the basis for that level.

(3) The Secretary shall, in any fiscal year, provide a notice of at least 30 days to such Committees before initiating any reduction of force at the Economic Regulatory Administration. Such notice shall provide at least—

(A) the reasons for such reduction;

(B) the impact on the mix of personnel and on all cases, whether or not in litigation, including the subpart V regulation proceedings; and

(C) the expected costs and savings for the applicable fiscal year.

(4) The Administrator of the Economic Regulatory Administration shall keep such Committees fully and currently informed about the status (including delays, settlement negotiations, and other pertinent matters) of all enforcement cases (whether or not in litigation) and subpart V regulation proceedings.

(Pub. L. 99-509, title III, §3005, Oct. 21, 1986, 100 Stat. 1884.)

References in Text

The Emergency Petroleum Allocation Act of 1973, referred to in subsec. (a)(3), is Pub. L. 93-159, Nov. 27, 1973, 87 Stat. 628, as amended, which is classified generally to chapter 16A (§ 751 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 751 of this title and Tables.

The Economic Stabilization Act of 1970, referred to in subsec. (a)(3), is title II of Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, formerly set out as an Economic Stabilization Provisions note under section 1904 of Title 12, Banks and Banking.

Codification

This chapter, referred to in subsec. (b)(3), was in the original "this Act", which was translated as meaning this subtitle, which enacted this chapter, to reflect the probable intent of Congress.

Section Referred to in Other Sections

This section is referred to in sections 4501, 4506 of this title.

Section 504 of the Department of Energy Organization Act, 42 U.S.C. §7194 (1982)

§ 7194. Requests for adjustments

(a) The Secretary or any officer designated by him shall provide for the making of such adjustments to any rule, regulation or order described in section 7191(a) of this title issued under the Federal Energy Administration Act [15 U.S.C. 761 et seq.], the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq.], the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], or the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.], consistent with the other purposes of the relevant Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens, and shall by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or recission of, exception to, or exemption from, such rule, regulation or order. The Secretary or any such officer shall additionally insure that each decision on any application or petition requesting an adjustment shall specify the standards of hardship, inequity, or unfair distribution of burden by which any disposition was made, and the specific application of such standards to the facts contained in any such application or petition.

(b)(1) If any person is aggrieved or adversely affected by a denial of a request for adjustment under subsection (a) of this section such person may request a review of such denial by the Commission and may obtain judicial review in accordance with this subchapter when such a denial becomes final.

(2) The Commission shall, by rule, establish appropriate procedures, including a hearing when requested, for review of a denial. Action by the Commission under this section shall be considered final agency action within the meaning of section 704 of title 5 and shall not be subject to further review by the Secretary or any officer or employee of the

Department. Litigation involving judicial review of such action shall be the responsibility of the Secretary.

(Pub. L. 95-91, title V, § 504, Aug. 4, 1977, 91 Stat. 590.)

REFERENCES IN TEXT

The Federal Energy Administration Act, referred to in subsec. (a), is Pub. L. 93-275, May 7, 1974, 88 Stat. 96, as amended, which is classified generally to chapter 16B (§ 761 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 761 of Title 15 and Tables.

The Emergency Petroleum Allocation Act of 1973, referred to in subsec. (a), is Pub. L. 93-159, Nov. 27, 1973, 87 Stat. 628, as amended, which is classified generally to chapter 16A (§ 751 et seq.) of Title 15. For complete classification of this Act to the Code, see Short Title note set out under section 751 of Title 15 and Tables.

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (a), is Pub. L. 93-319, June 22, 1974, 88 Stat. 246, as amended, which is classified principally to chapter 16C (§ 791 et seq.) of Title 15. For complete classification of this Act to the Code, see Short Title note set out under section 791 of Title 15 and Tables.

The Energy Policy and Conservation Act, referred to in subsec. (a), is Pub. L. 94-163, Dec. 22, 1975, 89 Stat. 871, as amended, which is classified principally to chapter 77 (§ 6201 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 6201 of this title and Tables.

44 U.S.C. §728 (1982)

§ 728. United States Statutes at Large: distribution

The Public Printer, after the final adjournment of each regular session of Congress, shall print and bind copies of

the United States Statutes at Large, to be charged to the congressional allotment for printing and binding. The Joint Committee on Printing shall control the number and distribution of the copies.

The Public Printer shall print and, after the end of each calendar year, bind and deliver to the Superintendent of Documents a number of copies of the United States Treaties and Other International Agreements not exceeding the number of copies of the United States Statutes at Large required for distribution in the manner provided by law.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1252.)

44 U.S.C. §2102 (Supp. V 1987)

§ 2102. Establishment

There shall be an independent establishment in the executive branch of the Government to be known as the National Archives and Records Administration. The Administration shall be administered under the supervision and direction of the Archivist.

(As amended Pub. L. 98-497, title I, § 101, Oct. 19, 1984, 98 Stat. 2280.)

Emergency Petroleum Allocation Act of 1973,
15 U.S.C. §751 *et seq.* (1982)
Supplemental Cross-Reference
(Supp. IV 1986)

CHAPTER 16A PETROLEUM ALLOCATION

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 766, 793, 796, 4501, 4502, 4504, 4505 of this title; title 30 section 1721; title 42 sections 6263, 6272, 6391, 7193, 7194, 8521; title 43 sections 1337, 1353.

Section 504 of the Department of Energy Organization Act,
42 U.S.C. §7194 (1982)
Supplemental Cross-Reference
(Supp. IV 1986)

§ 7194. Requests for adjustments

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 4504.

Supreme Court Rule 28.1

List of Parent Companies, Subsidiaries and Affiliates

The parent company of petitioner ICG Petroleum, Inc. is Inter-City Gas Corporation, whose subsidiaries (not wholly owned) are Greater Winnipeg Gas Company, ICG Utilities (Ontario) Ltd., Bonneville Gas Company Ltd., and ICG Scotia Gas Ltd. Central Capital Corporation owns a controlling interest in Inter-City Gas Corporation, the parent company of ICG Petroleum, Inc. Central Capital Corporation has the following additional subsidiaries (not wholly owned):

Jamestown Investment Limited (U.K.)
Capel-Cure Myers Capital Management Holdings Limited (U.K.)
TriCentral Acquisition Management Ltd.
BGH Central Investment Management Ltd.
Andrew Sarlos & Associates Limited
Frybrook Associates, Inc.
Canadian General Insurance Company
Toronto General Insurance Company
Traders General Insurance Company
MICC Investments Ltd. (Canada)
Central Guaranty Trustco Ltd. (Ontario)
U.S. Trust Corporation

Flying J, Inc. is the parent company of petitioner Flying J Petroleums, Inc. Flying J Corporation is the parent company of Flying J, Inc., which is a subsidiary of Thunderbird Resources, Inc.